

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 10, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP3202-FT

Cir. Ct. No. 1997FA203

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

LAURA K. WATERHOUSE,

PETITIONER-APPELLANT,

V.

THOMAS A. WATERHOUSE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Barron County:
EDWARD R. BRUNNER, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The Barron County Child Support Agency appeals an order denying its request for a reconciliation of Thomas Waterhouse's child

support payment records.¹ The court determined the agency was barred by the doctrine of laches from seeking reconciliation and making a claim for arrears against Thomas based on the reconciliation. We conclude laches is not an available defense and therefore reverse the order and remand this case for further proceedings. The agency also complains the court failed to address a question regarding Thomas's income. For reasons explained below, we do not address that question on appeal.

Background

¶2 Laura and Thomas Waterhouse were divorced in June 1998. At that time, Thomas was ordered to pay 25% of his income as child support. In January 2001, after the agency was unable to obtain Thomas's income tax records for 1998, 1999, and 2000, the agency submitted, and the court signed an order to show cause to force Thomas to provide the tax information. The agency also sought modification of the original child support order. After an initial appearance, the court set the matter for a final contested hearing in April 2001.

¶3 Meanwhile, Thomas filed a motion contesting custody and visitation issues, and the support modification motion was placed on hold pending resolution of Thomas's motion. In December 2001, the children's guardian ad litem filed a report regarding custody and visitation. The court ultimately scheduled a hearing for March 2002 to address Thomas's motion and the child support matter. As a

¹ Although the Barron County Child Support Agency is not formally captioned in this matter, Thomas does not dispute its role in this case or its standing. We will refer to the agency, not Laura, as the appellant.

This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

result of that hearing, the court modified Thomas's support obligation to a fixed dollar amount of \$734.52 per month.²

¶4 In March 2004, the agency sought reconciliation of the support order to calculate any arrears and requested additional tax information from Thomas for 2000 and 2001. The agency was attempting to reconcile the records from July 1998 to March 2002, when Thomas's obligation was set as a percentage. The reconciliation was completed in May 2004, but evidently was disputed by Thomas because of a disagreement over what exactly constituted his income for calculating the 25% obligation.³ The matter was ultimately before the court in August 2004.

¶5 At the August hearing, the court on its own motion determined that the agency had not reconciled Thomas's obligations as promptly as it should have. Concluding the agency was barred by the doctrine of laches, the court ordered that neither Laura nor the agency was entitled to a reconciliation of the percentage-based child support order. It further determined "there shall be no order for payment of any child support arrears based upon such a reconciliation." It never addressed the issue of what constituted Thomas's income during the time the percentage support order was in effect, although both parties were prepared to litigate this issue. The agency appeals.

² The parties do not tell us the result of the custody and visitation matters but they are immaterial to the issue before us.

³ The March 2002 modification order relied solely on income shown on Thomas's W-2 forms, effectively excluding inheritance and stock sale proceeds from his gross income. The original percentage order was not so clear. The initial decree ordered Thomas to pay 25% of all gross income, and the court's memorandum decision stated that "[a]ll income is subject to child support."

Discussion

¶6 Laches is an equitable doctrine that recognizes “a party ought not to be heard when he has not asserted his right for unreasonable length of time or that he was lacking in diligence in discovering and asserting his right in such a manner so as to place the other party at a disadvantage.” *In re Estate of Flejter*, 2001 WI App 26, ¶40, 240 Wis. 2d 401, 623 N.W.2d 552 (citation omitted). However, “it is well established that laches is not a viable defense for actions to recoup child support arrearages.” *Hamilton v. Hamilton*, 2003 WI 50, ¶48, 261 Wis. 2d 458, 661 N.W.2d 832. Therefore, it was error for the court to rely on the doctrine to preclude the agency’s reconciliation request, and Thomas concedes as much.

¶7 Nonetheless, Thomas argues that we should affirm because the result is correct, even if the reasoning was not. *See Schauer v. DeNeveu Homeowners Assoc., Inc.*, 194 Wis. 2d 62, 71, 533 N.W.2d 470 (1995). He suggests we apply issue preclusion to this case. We cannot. One step in determining whether issue preclusion applies requires a “fundamental fairness” analysis, something committed to the circuit court’s discretion. *See Paige K.B. v. Steven G.B.*, 226 Wis. 2d 210, 225, 594 N.W.2d 370 (1999). This court cannot exercise the circuit court’s discretion for it. *Milwaukee Women’s Med. Serv. v. Scheidler*, 228 Wis. 2d 514, 528 n.5, 598 N.W.2d 588 (Ct. App. 1999).

¶8 Accordingly, we reverse the order and remand this case to the circuit court. The doctrine of laches is inapplicable. However, the court may undertake an analysis as to whether issue preclusion applies. If the court determines issue preclusion applies to preclude reconciliation, the court will not need to determine what sources of income are to be considered. If, however, the court determines issue preclusion is inapplicable, it should address the agency’s concerns about

sources of income so that it may properly calculate Thomas's child support obligation. We do not reach the source of income question on appeal because we reverse on other grounds. *See Gross v. Hoffman*, 224 Wis. 296, 300, 277 N.W.2d 663 (1938) (only dispositive issues need be addressed).

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

